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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

YAFFA SEDAGHAT-POUR, Plaintiff and Appellant, v. SHAFA DAVID PEZESHKI, Defendant and Respondent.	B232584 (Los Angeles County Super. Ct. No. BC390083)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mary Ann Murphy, Judge. Affirmed.

Law Offices of David M. Wolf and David M. Wolf for Plaintiff and Appellant.

Theodora Oringher, Parry G. Cameron and Stacey L. Zill for Defendant and Respondent.

* * * * *

Plaintiff and appellant Yaffa Sedaghat-Pour brought a derivative action on behalf of defendant Wilshire-Westlake Building, Inc. (Wilshire-Westlake). Appellant, a minority shareholder, alleged that defendant and respondent Shafa David Pezeshki, an officer, director and majority shareholder, obtained secret profits by leasing portions of the building owned by the corporation for and through his independent business. Following a bench trial on her claims for breach of fiduciary duty and fraud, the trial court ruled that appellant failed to meet her burden to show Pezeshki had obtained a secret profit. It concluded the evidence showed appellant was aware of Pezeshki's use of the building and she failed to offer evidence to show how Pezeshki secretly profited from that use.

We affirm. Substantial evidence supported the trial court's conclusion that appellant failed to establish Pezeshki retained secret profits in the form of a "rent spread," or the difference between the amount one of his businesses charged another for rent and the amount of rent paid to Wilshire-Westlake. Moreover, the trial court properly premised its ruling utilizing appellant's theory and addressed the requisite elements of her claim.

FACTUAL AND PROCEDURAL BACKGROUND

Pezeshki's Business.

At all relevant times, Pezeshki has been the sole owner, director and shareholder of P&J Medical Management, Inc. (P&J), a corporation providing non-medical management services to medical groups. Through approximately 100 employees, P&J provided services to medical groups including front office staffing, billing and collection, overseeing hospital and health maintenance organization contracts, handling compliance issues, preparing reports for various entities and individuals, and handling audits. Appellant has never had any interest or involvement in P&J.

The Property and the Initial Leases.

Appellant's husband, Parviz Sedaghat-Pour (Sedaghat-Pour) and Pezeshki were friends. In March 1992, appellant, Pezeshki and two others—Iraj Khoshnood and Farid

Mahobian—formed a California limited partnership known as K.M.P. Wilshire Partnership (KMP Partnership), which had as its only asset a nine-story commercial building located at 2007 Wilshire Boulevard in Los Angeles (Property). Sedaghat-Pour made the decision to invest appellant's money in the venture. He, rather than appellant, was primarily involved in the decisions regarding the Property. The KMP Partnership ownership interests were allocated as follows: Appellant 16.67 percent, Pezeshki 33.33 percent, and the two other partners 50 percent. Appellant understood that the partnership's sole business was ownership of the Property and that the money made on the investment would be based on rent received.

Effective February 1994, KMP Partnership as lessor and Pezeshki, individually, as lessee entered into a commercial lease for a portion of the Property (1994 Lease). Before entering into the 1994 Lease, the KMP Partnership partners met to discuss Pezeshki becoming a tenant. Sedaghat-Pour and property manager Shahab Amir also attended the meeting. Pezeshki stated that he intended to operate a medical clinic at the Property. The partners advocated for Pezeshki to become a tenant, as they trusted him and could rely on his credibility more than an unknown medical group tenant. For this reason, Sedaghat-Pour suggested and the other partners insisted that Pezeshki, personally, be on the lease as opposed to one of his companies. Appellant had no objection to Pezeshki becoming the tenant.

The 1994 Lease encompassed approximately 3,200 square feet on the ground floor of the Property for a monthly rent of $6,000 or approximately $1.87 per square foot. The 1994 Lease provided that the lessee was to use and occupy the premises for "medical services/medical management." Appellant signed the 1994 Lease on behalf of the KMP Partnership and Pezeshki signed it as the lessee. The 1994 Lease contained no restrictions on Pezeshki's use of the Property. During the term of the 10-year lease, Pezeshki—through P&J—operated a medical clinic and paid rent from his personal account.

In December 1996, KMP Partnership as lessor and Pezeshki as lessee entered into another commercial lease for approximately 1,400 additional square feet on the

Property's ground floor (1996 Lease) for a monthly rent of $2,800 or $2.00 per square foot. This time Pezeshki signed the 1996 Lease as both lessor and lessee. He did so because he thought the proposed rent was fair and he would be able to increase business at the Property. When Pezeshki informed Sedaghat-Pour of his intentions, he responded favorably; at that time, Sedaghat-Pour was far more involved with the Property than appellant. Although Pezeshki did not discuss the 1996 Lease with appellant, Sedaghat-Pour told him that he consulted with his wife on all Property matters. Like the 1994 Lease, Pezeshki paid the rent due on the 1996 Lease from his personal account.

Beginning in 1994, appellant knew that Pezeshki was a tenant at the Property having an obligation to pay rent. She also knew that a medical clinic was being operated on the portion of the Property's ground floor that Pezeshki was leasing. Appellant visited the Property on multiple occasions with Sedaghat-Pour and observed the medical clinic operation. Moreover, appellant was present at meetings where Amir advised Sedaghat-Pour that the areas of the Property occupied by the medical clinic were leased by Pezeshki. She knew that she had no interest in and was not entitled to share in any profit that he made in connection with the clinic. The KMP Partnership partners never requested and did not discuss the possibility of sharing profits made from the operation of the medical clinic.

Formation of Wilshire-Westlake.

In 2000, the KMP Partnership partners agreed to dissolve the partnership and form Wilshire-Westlake, a California corporation. Prior to dissolution, Pezeshki and his wife Manijeh Pezeshki (Manijeh) purchased the two other partners' interests, thereby reallocating the Wilshire-Westlake shares so that Pezeshki was a 50 percent shareholder, Manijeh a 33.33 percent shareholder and appellant a 16.67 percent shareholder. The Property was transferred from the KMP Partnership to Wilshire-Westlake via a quitclaim deed.

Since Wilshire-Westlake's formation, Pezeshki has served as its president and chief financial officer, and Manijeh has served as its secretary. Between 2000 and 2004, they also served as its sole directors; in April 2004 Nasser Akhamzdeh was elected to

serve as a third director. Appellant never served as an officer or director of Wilshire-Westlake. Nonetheless, from 2000 going forward, she received detailed monthly financial reports regarding the Property that Amir prepared.

Wilshire-Westlake Leases.

In February 2000, Wilshire-Westlake's majority shareholders—Pezeshki and Manijeh—adopted a resolution following Pezeshki's request for more space at the Property. According to the resolution, Wilshire-Westlake would make more units available as Pezeshki requested, it would charge him a fair market value rent and Pezeshki would pay for the cost of any tenant improvements and utility consumption. Subsequently, in December 2003, Pezeshki and Manijeh resolved that Wilshire-Westlake would accept a new lease from Pezeshki following the expiration of the 1994 Lease, provided the corporation would continue to charge a fair market value rent and Pezeshki would continue to pay for tenant improvements and utilities. Notwithstanding these resolutions, Wilshire-Westlake's shareholders did not ratify, authorize or expressly consent to any of the subsequent leases Wilshire-Westlake entered into with Pezeshki.[1]

In April 2004, Pezeshki entered into a commercial lease with Wilshire-Westlake for approximately 3,600 square feet on the ground floor of the Property (2004 Lease) for a monthly rent of $7,200 or approximately $2.00 per square foot. Pezeshki signed the 2004 Lease as lessor and lessee. Though Pezeshki discussed the 2004 Lease with Sedaghat-Pour, he did not inform appellant about the lease. Sedaghat-Pour again told Pezeshki that he did not do anything relating to the Property without his wife knowing about it.

One month earlier, in March 2004, Pezeshki had entered into another commercial lease with Wilshire-Westlake for approximately 6,000 square feet on the second floor of the Property (2004 Second Floor Lease) for a monthly rent of $8,100 or $1.35 per square foot. Pezeshki signed the 2004 Second Floor Lease as lessor and lessee. Sedaghat-Pour

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[1] On occasion, we refer to the leases entered into by Pezeshki and Wilshire-Westlake collectively as the Wilshire-Westlake leases.

reacted favorably to Pezeshki's expanding the medical clinic services to the second floor; Pezeshki did not discuss the expansion with appellant. Pezeshki spent approximately $90,000 on tenant improvements to the second floor—none of which Wilshire-Westlake reimbursed. Pezeshki also paid for his own utilities and maintenance. Other tenants at the Property were not required to pay for their own tenant improvements or utilities.

In February 2005, Pezeshki entered into another commercial lease with Wilshire-Westlake for approximately 3,200 square feet on the Property's third floor (2005 Third Floor Lease) for a monthly rent of $4,800 or $1.50 per square foot. Again, Pezeshki informed Sedaghat-Pour but not appellant about the expansion. Pezeshki expended approximately $150,000 for unreimbursed tenant improvements to the third floor space.

In February 2007, the parties replaced the 2005 Third Floor Lease with a lease for approximately 6,700 square feet or the entire third floor (2007 Third Floor Lease) for a monthly rent of $8,851 or $1.32 per square foot. Sedaghat-Pour thought that Pezeshki's expanding his clinic on the third floor was a good idea. Pezeshki spent approximately $230,000 for tenant improvements to the additional third floor space, which was not reimbursed by Wilshire-Westlake.

Each of the Wilshire-Westlake leases was for a five-year term with two five-year options to renew. With the exception of the 2007 Third Floor Lease, which provided that the rent during the initial term and the option periods would increase annually by the greater of three percent or the consumer price index, the leases generally provided for a six percent rent increase after the first one or two years, and three percent annual rent increases thereafter. Pezeshki paid the rent on each lease from his personal account. For all leases except the 2004 Lease, the parties stipulated that Pezeshki paid fair market value for the Property.

At various times Pezeshki leased space at the Property above the third floor without a written lease, typically on a short-term basis. Pezeshki paid a fair market value rent for the space each month, and the payments were reflected on the monthly reports under the name of his medical clinic. In order to determine a fair market rent for the oral leases, he and Amir canvassed nearby properties.

In total, Pezeshki leased approximately 59 percent of the Property.

San Judas.

Beginning with the 1994 Lease, Pezeshki's medical clinic operated as the San Judas Medical Group (San Judas). In June 2001, P&J, Nejat Rostami Medical Group, Inc., doing business as San Judas, Pezeshki and Nejat Rostami, M.D., entered into a management services agreement (MSA) which provided P&J would manage the non-professional aspects of San Judas, including the provision of office space, furniture and equipment, quality assurance, and accounting and billing services. Prior to 2001, P&J had provided identical services to San Judas without a written agreement.

One of the management services P&J provided to San Judas under the MSA was the use of the Property. According to the MSA, P&J was to be paid a monthly management fee for its services, calculated as 55 percent of "gross collections" as that term was defined in the MSA. No specific allocation of the management fee paid to P&J was made for "rent" in connection with San Judas's use of the Property. In other words, San Judas never paid an amount identified as "rent" to Wilshire-Westlake, P&J or Pezeshki. P&J thus did not receive an amount identified as rent that was greater than the amount paid to KMP Partnership or Wilshire-Westlake for the use of the Property.

Beginning in 1994, appellant observed that a medical clinic was being operated on the Property. In addition, appellant personally reviewed the monthly reports from 2000 to approximately 2005. Though she saw the name San Judas or S.J.G.P. on the monthly reports, she never inquired as to whether San Judas or Pezeshki was the tenant. Also from at least 1994 until 2006, Amir met one to two times per month with Sedaghat-Pour to discuss the Property. Appellant accompanied her husband on many of those visits. Sedaghat-Pour was consistently pleased with the Property's performance and with Pezeshki's medical clinic operation. After Sedaghat-Pour became ill in mid-2006, however, Amir's contact with him decreased.

Sometime during 2004, appellant's daughter Lillian Sedaghat Yeroushalmi (Lillian) began reviewing the monthly reports on appellant's behalf. She would direct questions about the reports to Amir, and her contact with him increased in mid-2006 as

she began actively monitoring the Property. In response to Lillian's inquiry, Amir responded that Pezeshki was paying a fair market rent for the Property. Her primary concern was about the ground floor. Sometime in 2006, Lillian learned from Amir that Pezeshki was acting on behalf of San Judas. During 2007, she asked Amir why Pezeshki paid San Judas's rent from his personal account, and Amir responded that he did not know.

Sedaghat-Pour passed away in February 2008. San Judas left the Property in October 2009 and Central Medical MacArthur Park (CMMP) took over the space in November 2009. P&J maintained the same relationship with CMMP that it had with San Judas.

Neither appellant nor Sedaghat-Pour was aware of the MSA or the terms thereof. Pezeshki did not disclose the existence of the MSA to the Wilshire-Westlake shareholders and they did not authorize or approve the making of profits thereunder. Appellant was likewise unaware of the terms of the Wilshire-Westlake leases prior to the time she filed her lawsuit.

Pleadings, Trial and Judgment.

Appellant filed her initial complaint in May 2008 and the operative second amended complaint in March 2009, alleging claims for breach of fiduciary duty, fraud and deceit, conspiracy to breach fiduciary duty, and aiding and abetting breach of fiduciary duty. She claimed that Pezeshki, through his ownership of P&J, made a secret profit on the difference between what he paid Wilshire-Westlake under the leases and what he charged San Judas for its use of the Property. She sought general and special damages, and an accounting.

In August 2010, the trial court ordered a phase I trial on the issue of liability on the second (breach of fiduciary duty against Pezeshki and Manijeh) and third (fraud and deceit against Pezeshki) causes of action only. For purposes of the trial, the parties agreed that appellant need not prove damages and further stipulated that only Pezeshki's liability was at issue. In November 2010, the parties filed stipulated facts to be used in

connection with the trial and further agreed that witness testimony would be presented to address the facts about which the parties did not agree.

A bench trial commenced in November 2010. At the conclusion of closing arguments, the trial court ruled that appellant had failed to meet her burden to show there were secret profits. It stated: "Plaintiff has failed to prove by a preponderance of the evidence what percentage of the 55 percent management fee P&J charged San Judas and/or other tenants for rent as opposed to management or other services, pursuant to [an MSA] that charged 55 percent for management services [and] rent. Plaintiff has failed to prove that whatever amount P&J received for rent under the MSA exceeded what he was paying for rent under—what he was paying to Wilshire Westlake Building, Inc., as rent for the space at issue." It concluded that the evidence showed appellant knew Pezeshki was leasing space at the Property for the purpose of operating a medical clinic and that appellant did not want to share in his profit from that clinic. It further found that appellant offered no evidence to show that the amount P&J received for rent under the MSA exceeded the amount paid to Wilshire-Westlake for rent. The trial court issued a written statement of decision to the same effect.

Thereafter, the parties stipulated that judgment be entered on all claims and this appeal followed.

DISCUSSION

Appellant challenges only the trial court's determination on her second cause of action for breach of fiduciary duty. She makes two claims. First, she contends that she established the requisite elements to support her breach of fiduciary duty cause of action, and substantial evidence did not support the trial court's ruling to the contrary. Second, she argues that the trial court improperly limited her theory of recovery and premised its ruling solely on the absence of secret profits and that, in light of the parties' stipulation she need not prove damages, she should not have been required to demonstrate. We find no merit to her claims.

I. Standard of Review.

Appellant urges us to review this matter independently, contending that the issues on appeal involve only matters of law applied to stipulated facts. To the contrary, the issue of whether a party has breached his fiduciary duty is a question of fact. (*Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1599; *David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 890.) To facilitate the trial court's resolution of the question, the parties presented witness testimony and documentary evidence beyond the stipulated facts, and the trial court expressly relied on that evidence in its statement of decision. At the conclusion of the trial, the trial court expressly commented on the witnesses' credibility, stating that "[n]one of the witnesses were completely credible in their testimony in this courtroom. None."

Accordingly, in addressing appellant's primary contention on appeal we are guided by the standard of review summarized in *Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 765: "'In general, in reviewing a judgment based upon a statement of decision following a bench trial, "any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision. [Citations.]" [Citation.] In a substantial evidence challenge to a judgment, the appellate court will "consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the [findings]. [Citations.]" [Citation.] We may not reweigh the evidence and are bound by the trial court's credibility determinations. [Citations.] Moreover, findings of fact are liberally construed to support the judgment. [Citation.]'" (Accord, *Axis Surplus Ins. Co. v. Reinoso* (2012) 208 Cal.App.4th 181, 189.) "The substantial evidence standard of review applies to both express and implied findings of fact made by the court in its statement of decision. [Citation.]" (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 501.)

II. Substantial Evidence Supported the Trial Court's Findings on the Second Cause of Action.

Appellant's second cause of action alleged that Pezeshki[2] breached his fiduciary duty through engaging in self-dealing by directly or indirectly deriving a financial benefit through San Judas. Appellant further alleged that Pezeshi violated Corporations Code section 310[3] because the material facts relating to and his interests in those transactions were not (1) fully disclosed to or known by appellant, or approved by her; or (2) fully disclosed to or known by any other Wilshire-Westlake director, and never authorized, approved of or ratified by the Wilshire-Westlake board. Alternatively, she alleged that even if there had been disclosure to or knowledge by the board, Pezeshki's transactions were not just and reasonable as to Wilshire-Westlake. In her trial brief and arguments at trial, she more specifically articulated her theory that Pezeshki was liable because through his ownership of P&J he "made a profit for himself on the spread between what he paid Wilshire-Westlake under the leases and what P&J Medical Management, Inc. charged San Judas Medical Group to occupy [the Property]. Mr. Pezeshki did this in secret: he never disclosed to Wilshire-Westlake's board of directors or its shareholders his ownership of, involvement with or profiting through P&J Medical Management, Inc., and never obtained their authorization or approval thereof."

The trial court concluded that the evidence failed to show Pezeshki had received any secret profits. Addressing the "secret" aspect of the claim, the trial court stated: "Plaintiff testified that she was aware in 1994 that the ground floor was being used as a medical clinic. Plaintiff testified that she did not want to share in defendant Pezeshki's profit. That evidence strongly supports the other evidence in this case as to how this—the course of dealings on these—this building, i.e., that the initial conversation that they

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[2] Although the second cause of action was initially alleged against both Pezeshki and Manijeh, it was tried against Pezeshki only.

[3] Unless otherwise indicated, further statutory references are to the Corporations Code.

didn't want all kinds of various tenants in here. They wanted to deal with one person, Mr. Pezeshki, not somebody that could come in, some corporation that could go bankrupt. They trusted him; they knew him. He'd be the tenant. And that's the way it went." The trial court likewise determined there had been no evidence of "profit," as the evidence failed to show both what percentage of P&J's management fee was allocated toward rent and whether the percentage received by P&J exceeded the amount paid to Wilshire-Westlake for rent.

We find no basis to disturb the trial court's conclusion that the evidence was insufficient to establish secret profit liability.

A. Applicable Legal Principles.

"'It is hornbook law that directors, while not strictly trustees, are fiduciaries, and bear a fiduciary relationship to the corporation, and to all the stockholders. They owe a duty to all stockholders, including the minority stockholders, and must administer their duties for the common benefit. The concept that a corporation is an entity cannot operate so as to lessen the duties owed to all of the stockholders. Directors owe a duty of highest good faith to the corporation and its stockholders.' [Citations.]" (*Burt v. Irvine Co.* (1965) 237 Cal.App.2d 828, 850.) Officers and majority shareholders of a corporation are likewise bound by the same duty of good faith. (*Ibid*.)

For this reason, any transaction between the corporation and one of its directors or a majority shareholder is subject to rigid scrutiny: "'The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain. If it does not, equity will set it aside.' [Citations.]" (*Burt v. Irvine Co., supra*, 237 Cal.App.2d at pp. 850, 851; see also *Angelus Securities Corp. v. Ball* (1937) 20 Cal.App.2d 436, 439, 440 [a transaction between a corporation and a director is not voidable if in good faith and free from fraud, but it is subject to close scrutiny and "[t]he director must make a full disclosure of all pertinent facts or the transaction is voidable"].) But because directors are presumed to act in good faith, """[t]o warrant interference by a court in favor of minority stockholders . . . a case must be made out which plainly shows that such action is so far opposed to the true interests of the corporation itself as to lead to

the clear inference that no one thus acting could have been influenced by any honest desire to secure such interest, but that he must have acted with an intent to sub-serve some outside purpose, regardless of the consequences to the company."' [Citations.]" (*Burt v. Irvine Co., supra,* at p. 852.)

A transaction between a director and a corporation that results in secret profits to the director is voidable. (*Western States Life Ins. Co. v. Lockwood* (1913) 166 Cal. 185, 195 (*Western States*); *Burt v. Irvine Co., supra,* 237 Cal.App.2d at p. 851; *Tevis v. Beigel* (1957) 156 Cal.App.2d 8, 15 (*Tevis I*).) The *Burt* court stated: "Where the transaction results in a secret profit to the director, a suit may be brought by or on behalf of the corporation to recover the same, and an officer and director who knowingly approved and participated in the transaction may be held liable for the loss suffered by the corporation even though he personally received no consideration. [Citation.]" (*Burt v. Irvine Co., supra,* at p. 851.) Illustrating what must be shown to demonstrate secret profits, the court in *Tevis I* held a prima facie case was established by evidence that the plaintiff Midway Corporation, whose president and director was the defendant, entered into a contract to sell plumbing supplies to Universal Supply Company, owned by the defendant and his son-in-law. (*Tevis I, supra,* at p. 10.) The evidence further showed that the prices at which Midway sold its supplies to Universal were lower than its prices for other customers. (*Id*. at p. 11.) Emphasizing that this showing rendered the transaction voidable—not void—the court continued: "Upon it being shown that these sales were at prices below those charged to other customers, it was then incumbent upon defendants to show that they acted in good faith; that these lower prices were not unreasonable under the circumstances; that, for example, they were justified by defendants' large volume of purchases or by other sound business reasons." (*Id*. at p. 16.)

B. Substantial Evidence Supported the Trial Court's Conclusion That Pezeshki Did Not Breach His Fiduciary Duty by Obtaining Secret Profits.

In ruling that appellant did not offer sufficient evidence to establish secret profit liability, the trial court concluded the evidence showed that appellant was fully aware of Pezeshki's lease arrangements. The evidence demonstrated that appellant signed the

1994 Lease, which identified Pezeshki, personally, as the tenant and further provided that he was to use and occupy the premises for "medical services/medical management." Pezeshki told appellant that he intended to operate a medical clinic at the Property. The evidence further showed that appellant visited the Property many times and observed the operation of a medical clinic in the space that Pezeshki was leasing. Appellant attended meetings where Amir discussed the areas of the Property that Pezeshki was leasing for his medical clinic. Moreover, during the approximate five years after the formation of Wilshire-Westlake but before Lillian began acting on appellant's behalf, appellant personally reviewed the monthly reports concerning the Property. Those reports included detailed information about each unit in the Property, including the tenant's name, move-in date, scheduled rent and rent paid.

Further, appellant expressly disavowed any financial interest in Pezeshki's medical clinic operation. When asked "Did you at any time tell Mr. Pezeshki that, in connection with the operation of [a] medical clinic in the space that David Pezeshki was leasing and paying rent for, that you believed you were entitled to share in any profits he made?" appellant responded "No. I didn't want to have an interest in his profit. I didn't want to share in his profit."

1. Appellant failed to show Pezeshki made secret profits.

Appellant contends that evidence of Pezeshki's initial disclosures cannot overcome the stipulated evidence showing that Pezeshki failed to disclose to appellant the existence of the Wilshire-Westlake leases and the MSA. But contrary to appellant's position on appeal, the issue of appellant's knowledge was a disputed factual issue on which the parties presented testimony. After the trial court directed appellant's counsel to identify the disputed factual issues in the case, counsel stated "[p]rincipally, whether or nor—Mrs. Sedaghat-Pour had knowledge of Mr. Pezeshki's leases of the premises." "When the trial court has resolved a disputed factual issue, the appellate courts review the ruling according to the substantial evidence rule. If the trial court's resolution of the factual issue is supported by substantial evidence, it must be affirmed." (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.)

Here, substantial evidence established the Wilshire-Westlake leases were not secret. (See *Tevis v. Beigel* (1959) 174 Cal.App.2d 90, 98 (*Tevis II*) [in a suit to recover secret profits from a director obtained in breach of his fiduciary obligations, "[t]he existence of such secret profits is a *sine qua non* of the . . . action"].) The evidence showed that appellant knew about Pezeshki's occupancy and use of the Property beginning in 1994; she knew that a medical clinic operated on the Property for the next 16 years; Sedaghat-Pour knew about and approved the Wilshire-Westlake leases; and he consulted with appellant on all issues relating to the Property. Further, appellant was present during conversations where Amir discussed that Pezeshki was paying the rent for the space he leased at the Property on behalf of San Judas by writing his own checks.

Substantial evidence likewise supported the trial court's conclusion that there was insufficient evidence to show that Pezeshki generated "profits" from the Wilshire-Westlake leases under the MSA, a document which codified the arrangement between P&J and San Judas that had existed since at least 1994. Appellant sought to show that Pezeshki profited by keeping for himself the difference between the amount he paid Wilshire-Westlake as rent under the leases and the amount he charged San Judas through P&J to occupy the Property. According to the terms of the MSA, P&J received a management fee in the amount of 55 percent of San Judas's "gross collections," which were defined as fees collected from professional services furnished to patients, other fees derived from goods or services provided to patients and any other ancillary revenue. In exchange for the management fee, P&J agreed to provide a number of "management services," which included the provision of adequate administrative office space and facilities for the clinic operation at the Property. The MSA did not apportion the management fee among the various management services. Nor was there other evidence showing that there was any difference—or rent spread—between the amount that Wilshire-Westlake received as rent and the amount charged to San Judas by P&J for rent. In other words, there was no evidence that Pezeshki made a profit specifically from the Wilshire-Westlake leases.

Appellant seeks to rely on Pezeshki's testimony concerning San Judas's payment of rent. Responding to the question whether P&J reimbursed him for the rent he paid to Wilshire-Westlake, Pezeshki stated:

"A [PEZESHKI]: San Judas pays to P. and J., and David Pezeshki pay[s] rents out of his pocket for whole entire different leases.

"Q [COUNSEL]: But did P. and J. reimburse you for what you paid out of your pocket?

"A [PEZESHKI]: P. and J.—I take whatever it is left on this, and the rest of it would be profit that included everything."

This testimony failed to show that any such profit would have been directly tied to any difference in the amount of rent paid versus the amount received. Indeed, Pezeshki's testimony was no different than the stipulated facts that the total amount Pezeshki received from P&J exceeded the amount he paid to Wilshire-Westlake for rent and he derived a financial benefit from P&J. The evidence showed only that Pezeshki made a profit through P&J; it did not show that he made a secret profit in the form of a rent spread.

The absence of evidence of secret profits renders this case distinguishable from the cases on which appellant relies. For example, in *Western States, supra,* 166 Cal. 185, the plaintiff corporation contracted with a firm to sell its capital stock. According to the complaint, unbeknownst to the corporation's other directors, the president of the corporation demanded a percentage of the firm's profits, threatening that he would not assist with the stock sale if he did not receive a fee. He ultimately received over $40,000 following the stock sale. (*Id.* at pp. 188–190.) The court determined that these allegations sufficiently showed that the president acquired an interest that was antagonistic to his fiduciary duty to the corporation by secretly placing himself in a position where his duties to the corporation and his personal interests could conflict. Here, in contrast, there was no evidence that Pezeshki secretly placed himself in a position that was hostile to the interests of Wilshire-Westlake or that he received any secret pecuniary benefit from his transactions with Wilshire-Westlake.

Appellant's other authorities likewise have no application here, as they involve clear examples of corporate directors obtaining secret profits at the expense of the corporation. (See *F. & M. Bank v. Downey* (1879) 53 Cal. 466, 468 [bank directors who secretly conditioned loan to developer on receipt of portion of developer's net profits from sale of land required to return secret profits to the bank]; *Remillard Brick Co. v. Remillard-Dandini* (1952) 109 Cal.App.2d 405, 419 [breach of fiduciary duty for corporate directors to use majority power to strip manufacturing companies of sales function, thereby diverting large profits to sales companies in which the directors also held an interest]; *Highland Park Inv. Co. v. List* (1915) 27 Cal.App. 761, 763–764 [breach of fiduciary duty for corporate director to represent to corporation that property could be purchased for a certain sum and thereafter to secretly purchase the property in his wife's name for a lesser sum and resell it to the corporation for the original sum, retaining the difference].)

Rather, the circumstances here are more akin to those in *Brainard v. De La Montanya* (1941) 18 Cal.2d 502 (*Brainard*). There, three individuals entered into a partnership for the manufacture and sale of non-alcoholic beverages and later organized a corporation to carry on the same business. (*Id*. at pp. 503–504.) On behalf of the corporation, the bankruptcy trustee brought an action against the defendant, the majority shareholder, alleging three claims of breach of fiduciary duty. The trustee asserted that the defendant engaged in improper transactions by individually purchasing a building and leasing it back to the corporation, receiving commissions from purchasing and disposing of alcoholic beverages through the corporation, and acting independently as a broker of alcoholic beverages. (*Id*. at pp. 505–508.) Though the evidence conflicted, the appellate court affirmed the judgment in favor of the defendant on all three claims, concluding there was substantial evidence that the other directors had full knowledge of each of the claimed breaches. (*Id*. at p. 509.) Because the other directors knew about the defendant's transactions with the corporation and his receipt of profit from other businesses, the court ruled the trustee had no basis to attack the transactions. (*Id*. at pp. 509–510.) Here, likewise, evidence of appellant's knowledge of Pezeshki's clinic

operation at the Property and the lack of evidence showing his receipt of any rent spread supported the trial court's conclusion that Pezeshki did not receive secret profits.

2. Corporations Code section 310 does not govern.

Appellant next contends that Pezeshki's dealings with Wilshire-Westlake are voidable because he failed to satisfy the requirements of section 310, subdivision (a), a statute which offers three independent procedures to validate a transaction between a corporation and a director interested in the transaction.[4] (See *Sammis v. Stafford* (1996) 48 Cal.App.4th 1935, 1943.) The first method requires authorization, approval or ratification by the shareholders (§ 310, subd. (a)(1)), and the second by the disinterested directors (§ 310, subd. (a)(2)). These subdivisions are inapplicable, however, because the parties stipulated that the Wilshire-Westlake leases and Pezeshki's arrangement under the MSA were not authorized, approved or ratified by the Wilshire-Westlake board. Though the third method expressly applies under circumstances where the first two methods do not, section 310, subdivision (a)(3) also mentions the necessity of authorization, approval or ratification. (See § 310, subd. (a)(3) ["As to contracts or transactions not approved as provided in paragraph (1) or (2) of this subdivision, the person asserting the validity of the contract or transaction sustains the burden of proving that the contract or transaction was just and reasonable as to the corporation at the time it was authorized, approved or ratified"]; but see Friedman, Cal. Practice Guide: Corporations 2 (The Rutter Group 1996) ¶ 6:223.2, p. 6-43 ["Failure to obtain disinterested board or shareholder approval does not necessarily render an interested director contract void. However, in such cases, the burden rests on the party seeking to *uphold* the contract (normally, the 'interested' director) to prove that it was 'just and reasonable' to the corporation at the time it was authorized *or entered into*," second italics added].)

We are again guided by *Brainard*, *supra*, 18 Cal.2d 502. There, the court evaluated the application of the predecessor statute to section 310 to the transactions

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[4] In view of the trial court's conclusion that there was no evidence Pezeshki retained secret profits, it had no occasion to address the validity of the transaction under section 310.

between the defendant shareholder and the corporation that had not been authorized or approved by the directors or other shareholders. (*Brainard, supra*, at p. 510.) It determined that the validity of the transactions could be assessed despite the fact that none of the processes identified in the statute had been followed: "It is immaterial that no formal directors' meetings were held. While it is true that a corporation ordinarily acts by resolutions which are adopted at formal meetings of its board of directors and are entered in its minutes, it is also true that decisions reached by all the directors and stockholders of a closed corporation at informal conferences will be binding upon the corporation when, by custom and with the consent of all concerned, corporate formalities have been dispensed with and the corporate affairs have been carried on through such informal conferences." (*Id*. at p. 511.)

There, as here, the evidence showed that the other directors knew the defendant was dealing with the corporation and did not object. (*Brainard, supra,* 18 Cal.2d at pp. 505–508.) For example, in connection with the defendant's decision to purchase a building and lease it back to the corporation—even though the corporation itself had initially considered the purchase—evidence that one disinterested director said in the presence of the other "'It is all right with me'" was held sufficient to validate the transaction. (*Id*. at p. 505.) Here, appellant expressly authorized Pezeshki's initial use and occupancy of the Property and signed the 1994 Lease which indicated the Property would be used for the provision of medical services and medical management. In the years following, she personally viewed the Property and received monthly reports concerning the lease of the Property. As in *Brainard, supra*, at page 506, substantial evidence supported the trial court's conclusion that "no act of [Pezeshki] was done secretly or in violation of any fiduciary relationship which may have existed between defendant and the corporation."

III. The Trial Court Properly Characterized the Nature and Elements of the Second Cause of Action.

Appellant further argues that reversal of the judgment is warranted because the trial court's statement of decision was erroneous in two respects. She contends that the trial court improperly characterized her second cause of action as limited to secret profits and neglected to consider the parties' stipulation concerning damages in resolving the claim. We independently review these limited contentions, which involve "a mixed question of fact and law involving application of the law to facts." (*In re Marriage of Sivyer-Foley & Foley* (2010) 189 Cal.App.4th 521, 526.)

Preliminarily, we note that nothing in the record establishes that appellant objected to the statement of decision on these grounds below. Accordingly, appellant has forfeited any claim of error concerning the statement of decision. (E.g., *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1132 [a party who fails to object or assert a claimed deficiency to a statement of decision in the trial court waives the right to assert error on appeal]; *Akins v. State of California* (1998) 61 Cal.App.4th 1, 41, fn. 36 [same]; accord, *Children's Hospital & Medical Center v. Bontá* (2002) 97 Cal.App.4th 740, 776 ["'An appellate court will not consider procedural defects or erroneous rulings where an objection could have been, but was not, raised in the court below'"].)

Nevertheless, we briefly address her contentions. First, the trial court properly characterized appellant's claim as involving liability for secret profits. In multiple pretrial filings, appellant described her breach of fiduciary duty claim as involving a "secret profit" theory. According to appellant's trial brief, "this trial is limited solely and only to the issue of whether Mr. Pezeshki is liable to Wilshire-Westlake for secret profits under the second and third causes of action set out in the SAC and the court is limited at this time to entering its interlocutory judgment on those issues only." Likewise, from the beginning of trial through closing argument, appellant's counsel repeatedly described the case as involving Pezeshki's making secret profits. During opening statement, counsel stated that the evidence would show that Pezeshki, through P&J, secretly made a profit for himself on the difference between what he paid Wilshire-Westlake under the leases

and what P&J charged San Judas as rent. He repeated this theory during closing argument.

A party "may not change his theory of the case for the first time on appeal." (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 321, fn. 10; accord, *Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1316 ["It is a firmly entrenched principle of appellate practice that litigants must adhere to the theory on which a case was tried. Stated otherwise, a litigant may not change his or her position on appeal and assert a new theory. To permit this change in strategy would be unfair to the trial court and the opposing litigant"].) Because appellant tried the case on the theory that Pezeshki breached his fiduciary duty by obtaining secret profits, the trial court properly resolved the matter by addressing that theory and finding inadequate evidence to support it.

Second, appellant contends the trial court erred in finding that appellant failed to meet her burden to establish profits. She claims the parties' stipulation that she need not establish damages during the first phase of the proceedings essentially eliminated the need for her to establish "profits" in the context of proving secret profit liability. In pertinent part, the stipulation provided: "For purposes of any Phase One trial to determine whether liability exists under the second and/or third causes of action of the Second Amended Complaint under plaintiff's 'secret profit' theory the parties stipulate that the Court shall make such determination without regard to whether Wilshire-Westlake suffered damages and/or the amount of any such damages as the result of David Pezeshki's conduct, i.e., Plaintiff need not prove damages during the Phase One trial in order for the Court to determine whether or not liability exists under Plaintiff's 'secret profit' theory." The parties further limited the stipulation to the first phase of the proceedings, adding that Pezeshki reserved the right to contest both the existence and amount of any damages during phase two or any other proceeding "at which damages for 'secret profit' liability are to be addressed . . . ."

A stipulation is a contract, governed by the rules of construction applicable to other contracts. (*Chacon v. Litke* (2010) 181 Cal.App.4th 1234, 1252; *Winograd v. American Broadcasting Co., supra,* 68 Cal.App.4th at p. 632.) "As a contract, a

stipulation '" must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." [Citations.] The intention of the parties must be first determined from the language of the contract itself. [Citations.]'" (*Chacon v. Litke*, *supra*, at p. 1252.) "The terms of a contract are determined by objective rather than by subjective criteria. The question is what the parties' objective manifestations of agreement or objective expressions of intent would lead a reasonable person to believe. [Citations.]" (*Winograd v. American Broadcasting Co., supra*, at p. 632.)

Here, the only reasonable construction of the stipulation is that the parties intended to make a distinction between proof of secret profit liability and proof of damages. The language of the stipulation expressly contemplated that proof of secret profit liability was independent of proof of damages and, correspondingly, that Pezeshki may be able to show that appellant was not damaged even if she established secret profit liability. We cannot reasonably construe the stipulation as a concession on Pezeshki's part that appellant need not establish the "profit" element of her claim for secret profit liability. Moreover, our construction is consistent with the law, as proof of secret profit liability does not require a showing that the corporation suffered damage. (*Western States, supra*, 166 Cal. at p. 195 [explaining that while a corporation may recover the secret profit obtained by a corporate director in violation of his fiduciary duty, "[i]t is entirely immaterial that the corporation may not have been damaged by the transaction in which they were made"].) For these reasons, the stipulation did not preclude the trial court from determining in its statement of decision that appellant failed to establish Pezeshki had obtained profits in violation of his fiduciary duty.

DISPOSITION

The judgment is affirmed. Pezeshki is entitled to his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ